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Staining the Constitution

For Which It Stands

BY JOHN CONYERS JR.

At the same time the U.S. government is forcefully reminding the Chinese government of the need to safeguard civil liberties in Hong Kong, we are on the verge of modifying the Bill of Rights to limit freedom of expression in the United States for the first time in our history.

Demonstrators who cut the communist symbols from the center of East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their countries' laws, yet freedom-loving Americans justifiably applauded their brave actions. If we wish to maintain our moral stature in matters of human rights, it is essential that we remain fully open to political dissent, regardless of the unpopular form it takes—even disparagement of the U.S. flag.

Yet on June 12, the U.S. House of Representatives passed H.R.J. Res. 54, an amendment to the Constitution allowing Congress to prohibit flag desecration. Should the amendment receive similar support in the Senate and the states, we will have joined ranks with countries such as China, Iran, and Haiti and the regimes of the former Soviet Union and South Africa.

The flag desecration amendment responds to a perceived problem, flag burn-

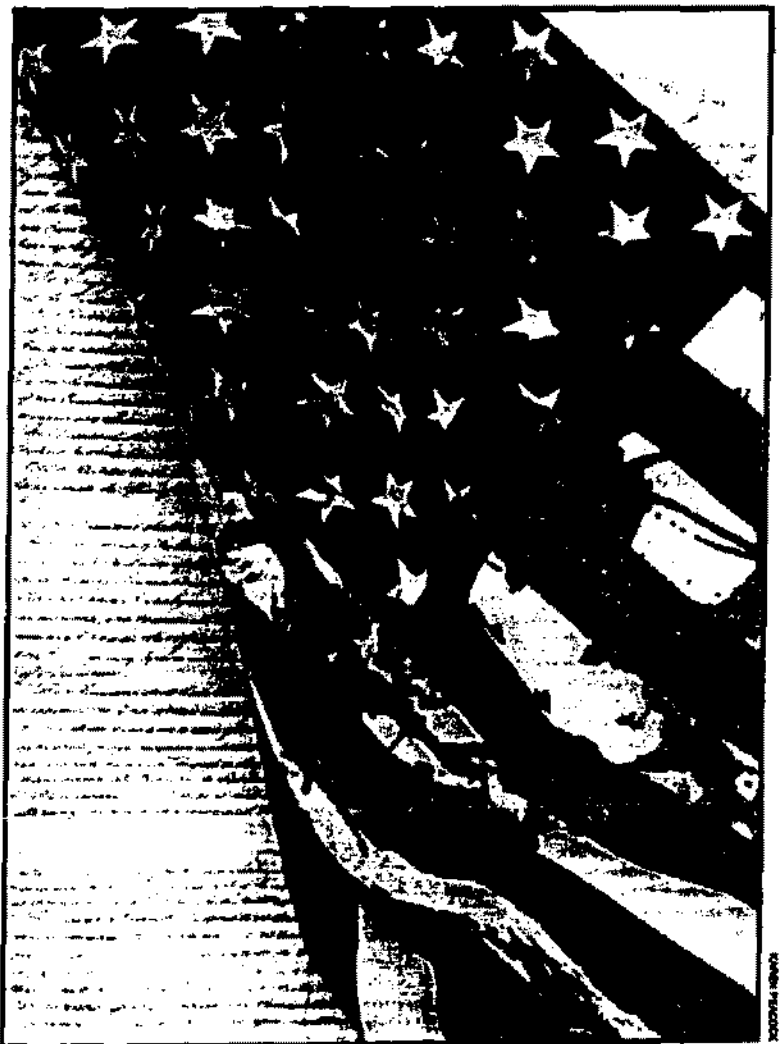
ing, which is all but nonexistent in American life. Indeed, studies indicate that in all of American history—from the adoption of the U.S. flag in 1777 through the Supreme Court's 1989 decision in *Texas v. Johnson*—there were only 45 reported incidents of flag burning. Moreover, most flag-burners can be successfully prosecuted under laws relating to breach of peace or inciting violence—all fully within constitutional constraints.

**The proposed
flag desecration
amendment
desecrates
the Bill of Rights.**

Ironically, the flag desecration amendment will not even achieve the sponsors' stated purpose: to protect the U.S. flag and honor America's veterans. History has taught us that similar restrictive legislation merely encourages more flag burning in an effort to protest the law itself, and a vaguely worded constitutional amendment will surely incite such efforts many times over. Rather than protecting the flag, an amendment will merely serve to dishonor the Constitution and compromise the very ideals our nation was founded on.

Rep. John Conyers Jr. of Michigan is the ranking Democrat on the House Judiciary Committee.

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C O M M E N T A R Y A N D A N A L Y S

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Nor is the demand for a flag desecration amendment among American citizens nearly as great as some polls might suggest. Although the majority of Americans initially support such an amendment, they oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment. But when those same voters were asked their opinion if they knew the amendment would be the first to restrict freedom of speech and freedom of political protest, support plummeted to 38 percent.

WRONG, WRONG, WRONG

The flag desecration amendment is wrong as a matter of principle, as a matter of precedent, and as a matter of practice.

A matter of principle. The true test of any nation's commitment to freedom of expression lies in its ability to protect unpopular expression, such as flag desecration. In 1929, Justice Oliver Wendell Holmes wrote that it was the most imperative principle of our Constitution that it protects not just freedom for the thought and expression we agree with, but "freedom for the thought we hate." Justice Robert Jackson explained it eloquently 14 years later in *West Virginia State Board of Education v. Barnette*:

Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitu-

tional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.

There can be no doubt that symbolic speech relating to the flag falls squarely within the ambit of traditionally protected speech. Our nation was born in the dramatic symbolic speech of the Boston Tea Party, and our courts have long recognized that expressive speech associated with the flag is protected under the First Amendment.

Beginning in 1931 with *Stromberg v. California* (overturning a state statute that prohibited the display of a "red flag") and continuing through the mid-1970s with *Smith v. Goguen* and *Spence v. Washington* (overturning convictions involving wearing a flag patch and attaching a peace sign to the flag), the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, when *Texas v. Johnson* reached the high court in the late 1980s, the state of Texas readily acknowledged that Gregory Johnson's conduct in burning a U.S. flag outside the Republican National Convention in Dallas constituted symbolic speech subject to protection under the First Amendment. Those who seek to justify H.R.J. Res. 54 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well-understood Supreme Court decisions.

While most Americans deplore the burning of a U.S. flag in hatred, we must recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one federal judge wrote in a 1974 flag-burning case, "the

flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."

The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag-burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will guard his or her rights and liberties should the need arise.

The flag desecration amendment will also open the door to selective prosecution based purely on political beliefs. When John Peter Zenger was charged with "seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, Andrew Hamilton, warned:

The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.

The history of the prosecution of flag desecration in this country bears out this very warning. The overwhelming majority of cases have been brought against political dissenters, while commercial and other forms of flag desecration have been almost completely ignored. A 1971 article in *Art in America* points out that during the Vietnam War, those arrested for flag desecration were "invariably critics of national policy,

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Disgracing the Flag

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while 'patriots' who tamper with the flag are overlooked." Whitney Smith, director of the Flag Research Center, has further observed that commercial misuse of the flag has been "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."

A matter of precedent. If we approve H.R.J. Res. 54, it is unlikely to be the last time that Congress acts to restrict our First Amendment liberties. As Charles Fried, President Ronald Reagan's solicitor general, testified in 1990:

Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely, not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is: just as the man who says that only this once let's make 2+2=5 does not know what it is to count.

Adoption of the flag desecration amendment will diminish and trivialize our Constitution. If Congress begins to second-guess the courts' authority concerning matters of free speech, not only will we be carving an awkward exception into a document designed to last for the ages, but we will be undermining the very structure created under the Constitution to protect our rights. This is why James Madison warned against using the amendment process to correct every perceived constitutional defect, particularly concerning issues that inflame public passion. Conservative legal scholar Bruce Fein emphasized the same concern when he testified at the 1995 House Judiciary hearings during an earlier attempt to pass a flag desecration amendment:

While I believe the *Johnson* and *Eichman* decisions [overturning flag-burning convictions] were misguided, I do not believe a constitutional amendment

would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the nation's charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.

Inserting the term "desecration" into the Constitution would, in and of itself, seem highly inappropriate. Webster's New World Dictionary defines "desecrate" as "to violate the sacredness of," and in turn defines "sacred" as "consecrated to a god or God; holy; or having to do with religion." The introduction of such terms into the Constitution could create a significant tension within our constitutional structure, in particular between the flag desecration amendment and the religion clause of the First Amendment.

A matter of practice. As a practical matter, H.R.J. Res. 54 is so poorly conceived that it will, no doubt, open up a Pandora's box of litigation. Not only are its terms incredibly vague, but it gives no guidance as to its intended constitutional scope or parameters. While the amendment's supporters claim they are merely drawing a line between legal and illegal behavior, in actuality they are drawing no line at all, but merely granting the federal government open-ended authority to prosecute dissenters who use the flag in a manner deemed politically inappropriate.

There is little understanding or consensus in Congress or the courts concerning the meaning of such crucial terms as "desecration" and "flag of the United States." Depending on the statute ultimately adopted under the amendment's authority, "desecration" could apply to cancellation of postage stamps or use of the flag by Olympic athletes. The term "flag of the United States" could include underwear from the Tommy Hilfiger collection.

Moreover, since H.R.J. Res. 54 is drafted to modify the entire Constitution, rather than any one portion of the First Amend-

ment, it is unclear whether and to what extent it will interact with other provisions in the Bill of Rights, including the void for vagueness doctrine (First and Fifth Amendments), the overbreadth and least restrictive alternatives test (First Amendment), search and seizure restrictions (Fourth Amendment), due process and self-incrimination protections (Fifth Amendment), and the cruel and unusual punishment bar (Eighth Amendment), as well as provisions in the Constitution relating to the supremacy clause (Article VI, Section 2) and the speech and debate clause (Article I, Section 6).

AN UNCHARTED INVASION

It is insufficient to respond to these concerns by asserting that the courts can easily work out the meaning of the terms in the same way that they have given meaning to other terms in the Bill of Rights, such as "due process" and "unreasonable searches and seizures." Unlike the other provisions of the Bill of Rights, which constrain the power of the state against the individual, the flag desecration amendment represents an uncharted invasion of the people's rights and liberties.

We have come too far as a nation to risk jeopardizing our commitment to freedom in a fruitless endeavor to legislate patriotism. As Justice Jackson wrote in *West Virginia State Board of Education v. Barnette*:

[The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

H.R.J. Res. 54 denigrates the vision of Madison and Jefferson and glorifies the simple-mindedness of those who would disparage our flag. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will have done what no foreign power has been able to do—limit the freedom of expression of the American people. ■